

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 93-57024-JRG

PORTOFINO DEVELOPMENT CORP.,

Debtors.

_____ /

PORTOFINO DEVELOPMENT CORP., Adversary No. 95-5397

Plaintiffs,

vs.

DAVID W. MARIANI, an individual,
MARIANI GROUP OF COMPANIES, a
California partnership, et al.,

Defendants.

_____ /

MEMORANDUM DECISION

I. INTRODUCTION.

Before the court are (a) plaintiff's Motion for Reconsideration of Order re Summary Judgment; (b) defendants' Cross Motion for Summary

Adjudication of Issues and Opposition to plaintiff's Motion for Reconsideration; and (c) Plaintiffs' Motion to Amend Complaint, and defendants' opposition thereto.

II. BACKGROUND.

On August 9, 1995, the debtor filed an adversary complaint against DAVID MARIANI, individually, and MARIANI GROUP OF COMPANIES, a California partnership (hereafter "MGC"), seeking relief through five causes of action relating to an 18-acre lot in Cupertino. There is disagreement as to who owned the 18 acre lot, or portions thereof, at various periods of time, which disputes are not relevant to the motions before the court. At some point, the property was split into a 12-acre lot and a 6-acre lot, and the parcels are alleged to have been transferred among a number of different entities. The parties agree that debtor Portofino Development Corporation, f.k.a. D.W. Mariani Development Corporation, a California corporation, and MGC entered into a construction loan agreement with lender Home Federal Savings & Loan sometime prior to April 1991, and that the bank required the entire 18 acres as security for its loan. The parties also agree that in or about May 1992, the same parties entered into a "First Loan Modification Agreement" which provided that the loan had matured and that no further advances would be made by Home Federal while fifteen units remained under construction. The units were to be sold when completed, with a release price being paid to the bank. Ultimately,

the entire 18 acres was foreclosed upon by the successor to Home Federal.

Defendants moved for summary judgment on all five causes of action contained in plaintiff's complaint.¹ Defendants' motion was granted in part and denied in part. With respect to the second cause of action for indemnification, the court granted summary judgment as to David Mariani, and denied summary judgment as to defendant MGC. Plaintiff has moved for reconsideration of the order granting summary judgment in favor of David Mariani on the second cause of action. Defendants, in turn, have brought a cross-motion for summary adjudication with respect to the second cause of action as to both David Mariani and MGC. Plaintiff has also moved for leave to file an amended complaint, which defendants oppose.

III. DISCUSSION.

A. Plaintiff's motion for reconsideration is granted.

The "First Loan Modification Agreement" which plaintiff contends gives rise to its second cause of action for indemnification is now before the court.² It is now clear that defendant David Mariani was in

¹ The causes of action contained in plaintiff's original Complaint were: Breach of Promissory Note (First Claim for Relief); Indemnification (Second Claim for Relief); Preference (Third Claim for Relief); Fraudulent Conveyance (Fourth Claim for Relief); and Claim on Open Account (Fifth Claim for Relief).

² The First Loan Modification Agreement was not before the court at the time defendants' first motion for summary judgment was heard.

fact a party to the agreement in the capacity of a guarantor. Given this fact, relief from the court's order granting defendant David Mariani's motion for summary judgment on the second cause of action is appropriate.³ The court may relieve a party from an order for any reason justifying relief from the operation of a judgment. Fed.R.Civ.P. 60(b)(6), made applicable in adversary proceedings by Fed. Rule of Bank. Proc. 7060. Plaintiff's motion is timely and the court finds that cause exists to grant plaintiff's motion. Accordingly, the court grants plaintiff's motion for reconsideration, and the order granting summary judgment in favor of defendant David Mariani as to the second cause of action is vacated.

B. Defendants' Cross-Motion for Summary Adjudication is Granted.

Having granted plaintiff's motion for reconsideration as to the Second Claim for Relief as to David Mariani, the court next considers defendants' request that the court grant their cross-motion for summary adjudication as to the Second Claim for Relief against David Mariani and MGC, on the ground that the First Loan Modification Agreement does not provide a legal basis for plaintiff's claim of indemnity. Defendants make specific reference to ¶ 14 of the Agreement, which provides for the borrowers (Portofino and MGC) to indemnify the lender

³ The court found at the hearing on June 7, 1996, that no evidence was presented to refute that David Mariani was not a party to the agreement which plaintiff alleged gave rise to claim of indemnity.

(Homefed Bank).⁴ Defendants contend that there is no provision by which MGC or Mariani agreed to indemnify Portofino.

Plaintiff initially argued that defendants' cross-motion was procedurally improper pursuant to B.L.R. 7007-1(a) for failure to provide the requisite 28 days notice. Plaintiff also argued that B.L.R. 7007-1(d), permitting a counter-motion relating to the subject matter of the original motion to be heard at the time of the original motion, is not applicable because defendants' cross-motion is not related to plaintiff's motion for reconsideration. Notwithstanding this procedural objection, plaintiff filed an opposition addressing the merits of the motion "in the interests of judicial economy." Plaintiff has not contended that any prejudice has been caused in opposing defendants' cross-motion, and plaintiff's counsel indicated at the hearing that no supplemental briefing was desired. The court therefore

⁴ Paragraph 14 of the First Loan Modification Agreement provides:

Indemnification of Lender. Borrowers hereby agree to defend (by counsel satisfactory to Lender), indemnify and hold harmless Lender, its officers, directors, shareholders, agents, employees, affiliates, subsidiaries, successors and assigns, from and against all losses, damages, liabilities, claims, actions, judgments, costs and attorneys' fees which Lender may incur, in any capacity, as a direct or indirect consequence of (a) Borrowers' failure to perform any obligation as and when required by any Loan Document and this Agreement; (b) the failure at any time of any of Borrowers' representations or warranties in the Loan Documents and this Agreement to be true and correct; (c) the costs, claims, and liabilities described in ¶ 4 (k) (vi) above; (d) any act or omission by Borrowers, any contractor, subcontractor, engineer, architect or other person with respect to the Project or the Real Property, including, but not limited to the claims and damages described in ¶ 12 above; (e) the claims and damages described in ¶ 13 above; and (f) the claims and damages described in ¶ 16 below.

overrules plaintiff's procedural objection to defendant's cross-motion, and considers the merits of the motion.

Defendants' cross-motion for summary adjudication is governed by Federal Rule of Civil Procedure 56, made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Federal Rule of Civil Procedure 56(b) provides:

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Fed.R.Civ.P. 56(b).

Summary judgment is appropriate where no genuine issue of material fact exists and a party is entitled to prevail in the case as a matter of law. Fed.R.Civ.P. 56(c); Bhan v. Nme Hospitals, Inc., 929 F.2d 1404, 1409 (9th Cir. 1991), cert. denied, 502 U.S. 994 (1991), citing, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), quoting Fed.R.Civ.P. 56(c). If the moving party satisfies this initial burden, the opposing party must go beyond the pleadings and by affidavit,

deposition, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Id. at 324. It is in light of this standard that the court considers defendants' cross-motion for summary adjudication.

Addressing the substance of defendants' cross-motion, plaintiff contends that it is ¶ 4(k) of the First Loan Modification Agreement which provides the basis for the claim of indemnification against MGC and David Mariani. Paragraph ¶ 4(k) provides:

Completion of 15 Units Under Construction. As a material inducement for Lender's [Homefed Bank] acceptance of this Agreement, Borrowers [Portofino Development Corp. and MGC] and Guarantor [David Mariani] covenant, warrant, and agree to complete the construction of the 15 Units Under Construction in a timely and workmanlike manner, without demand on Lender for further advances under the Note, Construction Loan Agreement, and other Loan Documents. Borrowers and Guarantor will finance this construction with their non-pledged assets and their Net Sale Proceeds, as defined in ¶ 4(j)(v) above, from the sale of the Completed Units. Borrowers' Net Sale Proceeds will be collected and administered as follows: . . .

Paragraph 4(k), p. 8, of the First Loan Modification Agreement.

Plaintiff contends that under California law, an obligation imposed upon several persons is presumed to be joint and not several (citing Calif. Civ. Code § 1431⁵), and, where all parties who unite in

⁵ Calif. Civ. Code § 1431 provides:

An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except as provided in Section 1431.2, and except in special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be

(continued...)

a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several (citing Calif. Civ. Code § 1659⁶). Plaintiff also contends that a party to a joint or joint and several obligation who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him. (Citing Calif. Civ. Code § 1432⁷). Plaintiff contends that ¶ 4(k) of the First Loan Modification Agreement obligated the parties not only vis-a-vis the bank, but also amongst themselves--that obligation being that each would contribute their own funds towards completion of the fifteen units. Plaintiff's counsel clarified at the hearing that plaintiff is not seeking indemnification and/or contribution for monies paid to the bank. Instead, plaintiff contends that Portofino undertook completion of the fifteen units and incurred several hundred thousand dollars in obligations to subcontractors and materialmen in reliance on the obligation set forth

(...continued)

overcome only by express words to the contrary.

⁶ Cal. Civ. Code § 1659 provides:

Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several.

⁷ Cal. Civ. Code § 1432 provides:

Except as provided in Section 877 of the Code of Civil Procedure, a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.

in ¶ 4 of the First Loan Modification Agreement. Plaintiff further contends that the debtor is unable to pay such obligations, and that it may properly look to MGC and Mariani for contribution.

The court does not agree that ¶ 4(k) of the First Loan Modification Agreement provides a legal basis for indemnification or contribution by Portofino against defendants MGC and David Mariani. The Agreement was between the lender, Home Federal Savings & Loan Association, on the one hand, and the borrowers, Portofino and MGC, on the other hand, with David Mariani acting as guarantor. Paragraphs 4(k), as well as ¶ 14, inured to the benefit of the lender. Indeed, the leading sentence of ¶ 4(k) states: "As a material inducement for the Lender's acceptance of this Agreement, [Portofino, MGC and Mariani] covenant, warrant, and agree to complete the construction of the 15 Units Under Construction in a timely and workmanlike manner, without demand on Lender for further advances under the Note. . ." (emphasis added). The "Consent of Guarantor" by David Mariani similarly provides:

Guarantor further warrants, covenants, and agrees that the Guaranty will remain in full force and effect and that his obligations to Lender under the Guaranty will not be diminished or exonerated by the modifications of the Loan Documents and the other terms and conditions described in this Agreement. Guarantor further warrants, covenants, and agrees that his obligations to Lender at all times hereto included and will at all times hereafter include the completion of construction of the 15 Units Under Construction). . . notwithstanding the termination of Lender's obligation to advance further funds to Borrowers under the Loan Documents for said construction and for all

other Phases and Subphases of the Project.

First Loan Modification Agreement, p. 20 (emphasis added.)

While it is clear that the lender had the right to enforce paragraph 4(k) of the Agreement, and it was indemnified under paragraph 14 of the Agreement, the Agreement does not provide for a right of contribution and/or indemnification as between the borrowers and the guarantor with respect to each other. Moreover, no evidence has even been introduced to establish that Portofino satisfied "more than [its] share of the claim against all," as required under Cal. Civ. Code § 1432. The "claim against all" is the obligation to the bank. The bank ultimately foreclosed on the property, so the bank's claim was obviously not satisfied. Defendants also correctly point out that, assuming ¶ 4(k) did create a right of contribution under the California Civil Code, an obligor who has paid nothing on the obligation cannot recover from his co-obligors for their proportionate share of the debt. Hosking v. Spartan Properties, Inc., (1969) 275 Cal.App.2d 152, 157, 79 Cal.Rptr. 893, 896. See also, Jackson v. Lacy, (1940) 37 Cal.App. 2d 551, 559, 100 P.2d 313, 317 (holding that a right of contribution is not acquired until a party pays more than his share of the claim, and a surety has no claim to contribution before he has paid the principal obligation). Plaintiff has argued that Portofino incurred obligations pursuant to ¶ 4(k) of the Agreement, which it is unable to pay. No evidence is provided, however, that Portofino actually paid more than

its share of the obligation to the bank, assuming it had a right to contribution or indemnification, which the court has found it does not. The court finds that summary adjudication in favor of MGC and David Mariani is appropriate with respect to plaintiff's second cause of action. Accordingly, defendants' cross-motion for summary adjudication is granted.

C. Plaintiff's Motion to Amend the Complaint is Granted in Part and Denied in Part.

Plaintiff moves to amend the complaint to identify Suzanne Decker, trustee as the real plaintiff in interest; to substitute additional parties in place of the defendants designated as "Doe" defendants in the complaint; and to add additional causes of action to the complaint. At the hearing, the court granted plaintiff's motion to add a cause of action for conversion as the new Third Claim for Relief under the First Amended Complaint, based on defendants having withdrawn their opposition to that aspect of the motion.⁸ This leaves remaining plaintiff's motion to amend the first cause of action for breach of promissory note, the second cause of action for indemnity, and to add a new fourth cause of action for alter ego. Before addressing the merits of the motion, the court first reviews the legal standard applicable to plaintiff's motion to amend.

A court is to freely allow leave to amend when justice so

⁸ Defendants withdrew their opposition conditioned upon Adversary Proceeding # 96-5425 being dismissed.

requires. F.R.C.P. 15(a); Foman v. Davis, 371 U.S. 178 (1962). "Delay alone does not provide sufficient grounds for denying leave to amend: 'Where there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion'." Hurn v. Retirement Fund Trust of Plumbing, Heating and Piping Industry of So. Calif., 648 F.2d 1252, 1254 (9th Cir. 1981), quoting, Howey v. United States, 481 F.2d 1187, 1190-91 (9th Cir. 1973).

Courts have shown "a strong liberality . . . in allowing amendments under Rule 15(a). 3 J. Moore, Moore's Federal Practice, ¶ 15.08[2], p. 15-47, et seq. (2nd ed. 1996). Recognizing that the entire spirit of the rules is to the effect that controversies shall be decided on the merits, the courts have not been hesitant to allow amendments for the purpose of presenting the real issues in the case, where the nonmoving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced and the trial of the issues will not be unduly delayed. Id.

1. Plaintiff's request to add Suzanne Decker as the real plaintiff in interest is granted.

The debtor's bankruptcy case was initially filed under Chapter 11 of the Bankruptcy Code. Upon conversion to a case under Chapter 7 of the Code, Suzanne Decker was appointed trustee of the

case. Defendants do not oppose the request to amend the complaint to properly reflect that Suzanne Decker is now the real plaintiff in interest. Plaintiff's motion to substitute the trustee as the plaintiff in this proceeding is granted.

2. Plaintiff's request to amend the First Claim for Relief to add MGC Land, a general partnership, as a defendant is granted.

The court previously granted defendant David Mariani's and MGC's motion for summary judgment with respect to the First Claim for Relief for breach of promissory note on the grounds that neither defendant was the obligor of the Note. Plaintiff now seeks to amend the complaint to name defendant MGC Land, a general partnership, as a defendant to the action. Defendants raise a number of objections which are addressed below.⁹

Defendants object that plaintiff has not followed appropriate state law "Doe defendant" designation procedure. Defendants contend that in California, a plaintiff must state in the body of the complaint that he or she is ignorant of the true names of the Doe defendants. Plaintiff's complaint in this proceeding designates "Does 1 through 20" in the caption, but no further statement regarding the Doe defendants is included within the body of the complaint. No legal authority is provided by defendants as to whether California's "Doe defendant"

⁹ Plaintiff objected that defendants' opposition was untimely. The objection was overruled at the hearing on the motion.

designation procedure is even applicable in this case.¹⁰ Plaintiff also does not address the issue in her reply.

The Federal Rules of Civil Procedure do not specifically provide for suing a defendant under a fictitious name. The Ninth Circuit Court of Appeals has upheld the application of state law "Doe defendant" procedure and "relation back" standards, rather than the standards set forth under the federal rules, where the amendment and service of process preceded removal of the case to federal court. See, Anderson v. Allstate Ins. Co., 630 F.2d 677 (9th Cir. 1980). In this case, however, the adversary proceeding was commenced in federal court, and the Federal Rules of Civil Procedure specifically provide for relation back of amendments to pleadings at Federal Rule of Civil Procedure 15(c).¹¹ The court finds no reason why the federal relation-

¹⁰ Defendants indicate in a footnote that "Defendants do not consider it necessary to address the complex issue of the extent to which-if at all-the state law Doe designation procedure applies in Federal court." [Defendant's [sic] Opposition to Plaintiff's Motion to Amend Complaint, p. 6, ln. 3.]

¹¹ Federal Rule of Civ. Proc. 15(c) provides:

An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service

(continued...)

back doctrine set forth in Federal Rule of Civil Procedure 15(c) should not apply in this proceeding.¹² Defendants' objection to plaintiff's motion to amend based on improper "Doe defendant" designation is denied.

Defendants next argue that plaintiff's amendments are barred by a court-imposed deadline for filing the action. The court is aware of no such deadline, and this objection is therefore also overruled.

Defendants next argue with respect to plaintiff's motion to amend the First Claim for Relief to add MGC Land as a defendant, that the Note in question is nonrecourse and that plaintiff can therefore not maintain an action on the Note. Plaintiff replies that there is a question as to whether the alleged amendment is legally binding on Portofino and it is entitled to take discovery on that issue. The court is mindful of the standard applicable to a motion to amend, and that such a request must be liberally granted absent bad faith, undue delay, prejudice to the opposing party, and futility of amendment. DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)(citations

(...continued)

of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party

¹² No argument was raised as to whether the standards for relation back of amendments set forth in Fed.R.Civ.Proc. 15(c) have been satisfied, and therefore the court does not address the issue.

omitted). While there may be questions going to the merits of whether plaintiff can prevail on its First Claim for Relief, plaintiff should be afforded the opportunity to test her claim on the merits.

The court does not find any evidence of bad faith or undue delay on the part of plaintiff in seeking to amend the complaint. Plaintiff has indicated that it was not until defendants filed their first motion for summary judgment that a copy of the Note was provided. There is also no prejudice to defendants given the fact that no discovery cut-off date has been set, no pre-trial conference has been scheduled and no trial date is pending. Plaintiff's motion to amend its First Claim for Relief to add defendant MGC Land as a defendant is granted.

3. Plaintiff's motion to amend the complaint to add the general partners of MGC as defendants to the Second Claim for Relief is denied.

The court has found that there is no legal basis for plaintiff's claim for indemnification and/or contribution with respect to the Second Claim for Relief against defendants David Mariani and MGC. Plaintiff's request to amend the complaint to add MGC's general partners as defendants to the Second Claim for Relief, who also provided no indemnity to Portofino, would therefore be futile. Where an amendment is futile, it should not be permitted. See, Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983), cert. denied, 464 U.S. 822 (1983); and Foman v. Davis, 371 U.S.

178 (1962). Plaintiff's motion to amend the Second Claim for Relief is denied.

4. Plaintiff's motion to amend the complaint to add a new Fourth Claim for Relief is denied with leave to amend.

Plaintiff moves to amend the complaint to add a new Fourth Claim of Relief for alter ego against defendant David Mariani. Defendants objected that plaintiff knew or should have known of the existence of the cause of action at the time the original complaint was filed. This objection is overruled. Plaintiff contends that she only learned of the cause of action for alter ego after reviewing over 25 boxes of corporate documents over a four-month period, which took from late January 1996 when the documents were turned over to the trustee, until May 1996. Plaintiff also indicates that many of the corporate records had been "misplaced" until plaintiff brought a motion to compel in June 1996. As already indicated, there is no evidence that plaintiff has acted in bad faith or for the purpose of delay, or that prejudice will be caused to defendant by allowing the amendment.

The court finds merit, however, to defendants' argument that plaintiff's Fourth Claim for Relief cannot survive a motion to dismiss because it fails to state a cause of action for which relief may be granted. An amendment is viewed as futile where the pleading cannot survive a motion to dismiss under Federal Rule of Civ. Proc. 12(b)(6). See, Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988), citing, 3 J. Moore, Moore's Federal Practice, ¶ 15.08[4] (2nd ed. 1974)

(providing proper test when determining legal sufficiency of proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)). Defendants first argue that a corporation cannot pierce its own corporate veil. However, plaintiff accurately cites to case law which supports that a corporation may in fact pierce its own corporate veil. One such case is Davey Roofing, Inc., 167 B.R. 604 (Bankr.C.D.Cal. 1994), which provides that California recognizes two kinds of alter ego claims--one where a creditor attempts to pierce the corporate veil, and the other where the corporation pierces its own corporate veil. Id. at 608. However, a bankruptcy trustee of a corporate debtor cannot maintain an action on an alter ego theory absent some allegation of injury to the corporation giving rise to the right of action in it against defendants. See, Stodd v. Goldberger, (1977) 73 Cal.App.3d 827, 833, 141 Cal.Rptr. 67, 71. Plaintiff's counsel acknowledged this pleading requirement at the hearing, but contended that such injury was alleged by incorporation of various allegations of the First Amended Complaint into the Fourth Claim for Relief.

The Fourth Claim for Relief contained in the First Amended Complaint alleges various conduct on the part of defendant David Mariani as supporting its alter ego theory, but no injury to the corporation is alleged. The Fourth Claim for Relief does incorporate paragraphs 1-17 of the First Amended Complaint, however no injury to

the corporation is alleged in those paragraphs either. Paragraphs 1-5 identify the parties to the First Amended Complaint; paragraphs 6-13 allege, *inter alia*, the various transfers which took place with respect to the property and the agreements with the lender; and paragraphs 14-17 allege breach of promissory note by MGC Land. No injury has been alleged to the corporation as arising out of the alter ego claim, even by incorporation of other paragraphs of the complaint. Because plaintiff's Fourth Cause of Action fails to allege a necessary component of the alter ego claim, it would not survive a motion to dismiss under Fed.R.Civ.P. 12(b)(6). Plaintiff's motion to amend as to the Fourth Claim for Relief is therefore denied, however plaintiff shall have fifteen days leave to amend the Fourth Claim for Relief.

IV. CONCLUSION.

For the foregoing reasons, plaintiff's motion for reconsideration is granted; defendants' cross-motion for summary adjudication as to the Second Claim for Relief against defendants MGC and David Mariani is granted; and plaintiff's motion to amend the complaint is granted in part and denied in part. Plaintiff's motion to amend is granted with respect to the First Claim for Relief to add MGC Land, a general partnership, as a defendant to the action; plaintiff's motion to amend is denied with respect to the Second Claim for Relief to add John Mariani and other general partners of MGC; and plaintiff's motion to amend is denied with respect to the Fourth Claim for Relief against

David Mariani, however plaintiff shall have fifteen days leave to amend such claim.

DATED: _____
JAMES R. GRUBE
UNITED STATES BANKRUPTCY JUDGE

Adversary No. 95-5397

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
CERTIFICATE OF MAILING**

I, the undersigned, a regularly appointed and qualified deputy clerk in the office of the Bankruptcy Judges of the United States Bankruptcy Court for the Northern District of California, San Jose, California hereby certify:

That I, in the performance of my duties as such deputy clerk, served a copy of the Court's MEMORANDUM DECISION by depositing it in the United States Mail, First Class, postage prepaid, at San Jose, California on the date shown below, in a sealed envelope addressed as listed below:

Office of the U.S. Trustee
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I declare under penalty of perjury under the laws of the United

States of America that the foregoing is true and correct. Executed on
_____ at San Jose, California.
